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SUPREME COURT OF THE STATE OF WASHINGTON

RICHARD and ANNETTE BOWIE, d/b/a VALPAK OF WESTERN
WASHINGTON-NORTH, et al.,

Petitioner,

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

Heidi A. Irvin, WSBA No. 17500
Assistant Attorney General
Donald F. Cofer, WSBA No. 10896
Senior Counsel
Office of the Attorney General
Revenue Division
P.O. Box 40123
Olympia, WA 98504-0123
(360) 753-5875

ORIGINAL

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I. INTRODUCTION

Since 1937, the Legislature has allowed publishers of newspapers, periodicals and magazines to pay a lower business and occupation (“B&O”) tax rate than the standard rate for businesses not singled out for such preferential treatment. RCW 82.04.280. This case concerns a group of taxpayers (“petitioners” or “franchisees”) who sell advertising services to local businesses that advertise in VALPAK® envelopes. The trial court correctly concluded on summary judgment that the petitioners do not qualify for the printing and publishing B&O tax rate under RCW 82.04.280. The petitioners are not engaged in the business of “publishing” Valpak envelopes. Furthermore, Valpak envelopes are not “periodicals or magazines” under the definition in RCW 82.04.280. The Department asks the Court to affirm the trial court.

II. ISSUES ON REVIEW

This Court accepted review on all the issues in the case:

1. Are the Franchisees “in the business of . . . publishing” Valpak envelopes or are they in the business of providing advertising services?
2. Are Valpak envelopes “periodicals or magazines” under the definition in RCW 82.04.280 if they are not “printed publications” like newspapers, magazines, and periodicals and they are not issued regularly “at *stated* intervals”?

III. STATEMENT OF THE CASE

The eight petitioners are franchisees of Val-Pak Direct Marketing Systems, Inc. (VPDMS), a corporation headquartered in Florida. CP 227. As franchisees of VPDMS, they solicit advertisements for placement in Valpak envelopes, which VPDMS prints and mails into most of Western Washington to franchise-specific territories. CP 223-73. The Valpak product is a blue envelope with coupons and advertising flyers inside. CP 158, 285-372 (sample Valpak envelope set). VPDMS mails Valpak envelopes to addresses in Western Washington twelve times per year, under schedules set by the franchisees. CP 6, 419-30. The envelopes contain advertising the franchisees solicit in their respective territories and advertising VPDMS solicits (primarily national advertisers). CP 220.

Franchise agreements control the respective authority of the franchisees and VPDMS related to publishing, printing, advertising solicitation, intellectual property rights, editorial control, and other aspects of the business. CP 159-60, 223-73, 386. The franchise agreement grants each franchisee "the right and license to sell advertising inserts . . . to be placed in VAL-PAK Envelopes" to be distributed in the franchise territory. CP 229, § 3.1(a).

In 2002, an attorney wrote the Department on behalf of one franchisee to request a letter ruling that Valpak envelopes qualify as "periodicals or magazines" under RCW 82.04.280. CP 391-93. The attorney stated that Richard and Annette Bowie were the publishers of Valpak envelopes and requested "confirmation" that they could report the

income from their business under the printing and publishing tax rate for B&O tax under RCW 82.04.280, rather than under the higher catch-all rate for unspecified “service and other” businesses in RCW 82.04.290, under which they had previously been reporting. CP 64, 391-93. The Department initially responded that the Bowies could report under the printing and publishing category, but rescinded that letter ruling in writing three months later. CP 395-97.¹ In the meantime, however, the Bowies and other Valpak franchisees had filed requests for refunds for amounts they allegedly had overpaid since 1998. CP 399-402. The Department denied the refund requests, reiterating its position that the franchisees’ gross income was taxable under the “service & other” classification, not the printing & publishing classification. CP 404-10.

¹ WAC 458-20-100(2)(a) describes the process by which taxpayers may obtain an opinion from the Department’s Taxpayer Services Division regarding tax reporting. The process involves no hearings or evidentiary inquiries. The Division issues letter rulings based on the facts provided by the taxpayer. The Court of Appeals decision therefore is inaccurate when it states that the Department “categorized” the Bowies’ activities as “publishing” and “confirmed their publisher status.” *Bowie v. Dep’t of Revenue*, 150 Wn. App. 17, 18, 19, 206 P.3d 675 (2009). The Department answered only whether Valpak envelopes qualify as “periodicals or magazines,” not whether the Bowies were publishers. The Department did not decide whether the Bowies were publishers because their counsel stated that they were. When the franchisees filed their *de novo* refund claim in superior court, the Department investigated and determined the franchisees were not in the business of publishing.

Likewise, the record contradicts the franchisees’ representation that “the Department has completely reversed its position.” Reply on Pet. for Rev. at 7 (citing *Dot Foods, Inc. v. Dep’t of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009)). The Department made a mistake in advising a *single* taxpayer and corrected it promptly. This case does not concern an administrative rule or other official interpretation the Department issued and then overruled years later. Indeed, it is the franchisees who have changed positions — they reported their gross income under the “service & other” classification starting in 1987 and did not assert until 2002 that they were entitled to be considered publishers of periodicals. CP 156 (beginning of Bowies’ business); 277 (Bowies previously reported under “service & other”).

The franchisees filed an administrative appeal. CP 47-51. The Department's Appeals Division ruled that Valpak envelopes were not "publications," and therefore were not "periodicals or magazines" under RCW 82.04.280. CP 275-83. The ruling concluded that the franchisees instead were subject to the "service & other" tax rate under RCW 82.04.290. CP 282.

The franchisees filed a *de novo* action under RCW 82.32.180, seeking a refund of taxes paid from January 1998 through January 2006, in the amount of the difference between the service & other B&O tax rate and the lower printing & publishing rate. CP 5-10. The trial court granted summary judgment to the Department on cross-motions. CP 11, 437, 712-14. In his oral ruling, the trial judge held both that the franchisees were not the publishers of Valpak envelopes and that the envelopes did not qualify as "periodicals or magazines" under RCW 82.04.280. RP 43-45.

The Court of Appeals reversed in part. It examined the statutory definition of "periodical or magazine" and held that Valpak envelopes are "printed publications." *Bowie v. Dep't of Revenue*, 150 Wn. App. 17, 20-23, 206 P.3d 675 (2009). It also concluded that the phrase "stated interval" means the franchisees must provide the intended audience of Valpak envelopes with the mailing or publication interval, and it remanded the case to the trial court on that point. *Id.* at 23-24. It did not decide whether the franchisees were engaged in the business of publishing Valpak envelopes, erroneously believing the trial court had not yet addressed the issue. *Id.* at 24 n.9 (indicating the trial court would need to

address this issue “for the first time” only if it found the “stated interval” requirement had been met); *but see* CP 443-50; 519-23; 537-43; 697-700 (briefing in trial court regarding “publishing” issue).

Both sides moved for reconsideration on different grounds, and the Court of Appeals denied both motions without comment.

IV. ARGUMENT

RCW 82.04.280 provides a preferential tax rate for persons “engaging . . . in the business of . . . publishing newspapers, periodicals, or magazines.”² The statute defines “periodical or magazine” as “a printed publication, other than a newspaper, issued regularly at stated intervals at least once every three months, including any supplement or special edition of the publication.”

This Court should first hold that the franchisees were not “engaging . . . in the business of . . . publishing” periodicals or magazines during the tax period. Rather, they engaged in the business of providing advertising services to local businesses that wished to advertise in Valpak envelopes. The business of providing advertising services is taxable at the standard “service & other” B&O tax rate, RCW 82.04.290(2), not at the favorable rate for publishers of newspapers, periodicals, and magazines in RCW 82.04.280. Even if the franchisees were publishers, however, Valpak envelopes are not “periodicals or magazines.” They are not

² The Legislature amended RCW 82.04.280 in 2009, removing newspaper publishing from that section and placing it in a different section with an even lower B&O tax rate. The Legislature did not amend any of the relevant statutory language relating to periodicals or magazines. Laws of 2009, ch. 461, §§ 1-3.

“printed publications,” nor are they issued regularly at “stated intervals.” The Legislature has not authorized this preferential tax rate for envelopes with loose coupons inside.

The trial court reached the correct conclusion. Under the record in this case, the franchisees were not engaged in the business of publishing, and the coupons and envelopes did not qualify as a “periodical or magazine.” The franchisees have not met their burden of proving they paid an incorrect amount of tax. RCW 82.32.180.

A. To Be Engaged In The Business Of Publishing Under RCW 82.04.280, A Taxpayer Must Actually Publish Newspapers, Periodicals, or Magazines.

To qualify for the printing and publishing B&O tax classification, a taxpayer must engage in the business of printing or publishing. The trial court properly granted summary judgment to the Department on this basis because the franchisees are not the publishers of Valpak envelopes.

1. B&O tax classifications are based on business activities, not on industries.

B&O taxes are imposed on every person “for the act or privilege of engaging in business activities,” not for the privilege of conducting a business related to a particular industry. RCW 82.04.220. The B&O tax code contains different tax rates for different business activities. For instance, RCW 82.04.280 assigns a tax rate of 0.484% to persons engaging in the business activities of printing; publishing; building, repairing, or improving streets; extracting or processing for hire; and radio and television broadcasting, among others. Where the Legislature has not

assigned a rate to a particular business activity, the rate is 1.5% under the “service and other” classification. RCW 82.04.290(2). Taxpayers engaging in more than one business activity are taxable under each applicable classification. RCW 82.04.440(1).

Given this structure, the tax rates for engaging in specific business activities are intended to apply only to taxpayers that actually perform those business activities. Thus, for example, the rate for those engaging in the business of building or repairing streets is not intended to apply to other taxpayers that may perform services related to the road construction industry (such as businesses manufacturing asphalt or concrete barriers), but that do not actually build or repair streets.

Since 1937, the Department and its predecessor agency, the Tax Commission, have interpreted “engaging in the business of” publishing newspapers, periodicals, or magazines to mean being the publisher of such a publication. The Tax Commission amended Rule 143 in 1937, to state: “*Publishers* of newspapers, magazines and periodicals are taxable under the ‘Printing and Publishing’ classification upon the gross income derived from the publishing business.” Appendix A3 (emphasis added). The current version of the Department’s rule, WAC 458-20-143, contains the same language.³ Appendix A2. This interpretation is consistent with the B&O tax code structure and the clear intent of the Legislature from the

³ Until the Department questioned whether the franchisees actually were the publishers of Valpak envelopes, the franchisees also interpreted the statute this way. See CP 392 (describing B&O tax classifications “potentially applicable to publishers”).

original enactment of the B&O tax to apply tax rates to particular business activities.

The Court should accord great weight to this longstanding administrative interpretation of the statute, particularly given the Legislature's acquiescence in that interpretation despite other amendments over time. *See In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995). Indeed, the Legislature has expressly adopted that interpretation in other related statutes. *See* RCW 35.102.150 (for purposes of city B&O taxes, "the activities of . . . publishing newspapers, periodicals, or magazines, shall have the same meanings as attributed to those terms in RCW 82.04.280(1) by the department of revenue"); RCW 82.08.806(3)(e) (regarding sales of computer equipment to printers or publishers, defining "printer or publisher" as a person subject to tax under RCW 82.04.280). In addition, the lack of any litigation on this issue for more than 70 years confirms the reasonableness of the administrative interpretation and taxpayers' general acceptance of that interpretation.

2. The franchisees sell advertising services, and VPDMS, not the franchisees, publishes Valpak envelopes.

The undisputed evidence establishes that VPDMS is the publisher of Valpak envelopes. The franchisees, in contrast, are engaged in the business of providing advertising services, not the business of publishing. The Department discussed various provisions in the franchise agreement in its Court of Appeals brief, and a complete franchise agreement is in the record. Respondent's Brief at 14-20; CP 223-73. Highlights include:

- VPDMS “is engaged in the business of publishing and distributing by direct mail promotional literature and packages known as VAL-PAK Envelopes, . . .” CP 227.
- The franchise granted to franchisees “does not include any right on the part of FRANCHISEE to itself print, publish or distribute VAL-PAK Envelopes or Advertising Inserts bearing the Marks . . . and FRANCHISEE *is expressly prohibited from engaging in any of such activities.*” CP 230 (emphasis added).
- VPDMS is “the sole publisher and distributor in the United States of VAL-PAK Envelopes” CP 232.
- VPDMS “shall produce and distribute . . . all VAL-PAK Envelopes to be distributed within the Territory” CP 232.
- VPDMS “shall have final approval over the form and content of each individual item to be included in a VAL-PAK Envelope” and “shall have the sole discretion to determine the appearance and style of VAL-PAK Envelopes” CP 232.

The franchise agreement leaves no doubt on the subject: The franchisees do not publish Valpak envelopes, and if they did, they would be in breach of the agreement.

The franchisees have not challenged the accuracy of any provision in the franchise agreement. To the contrary, Richard Bowie confirmed in his deposition that the franchise agreements accurately reflect the franchisees’ business relationship with VPDMS. CP 159, 160. Instead, the franchisees argue that the Department is focusing solely on contract “labels” instead of the franchisees’ business activities. *See, e.g.,* Reply on Petition for Review at 3-4. That argument is without merit.

First, contract provisions such as the one prohibiting the franchisees from printing, publishing, or distributing Valpak envelopes, CP 230, are substantive provisions, not mere “labels.” Second, the franchisees ignore Mr. Bowie’s testimony tying the contract language to

his franchise businesses, which precludes any “form” over “substance” argument. Finally, the franchisees fail to acknowledge that the other evidence they provided in discovery regarding their businesses is consistent with the terms of the franchise agreement. *See* Respondents’ Brief at 17-23 and evidence cited therein. Thus, the undisputed evidence establishes that only VPDMS publishes Valpak envelopes.

The same evidence also proves that the franchisees engage in the business of providing advertising services. Their role in “creating” advertising inserts, for instance, is completely consistent with the Department’s rule for advertising agencies, which recognizes that such businesses make purchases of “plates, engravings, electrotypes, etchings, and other articles . . . for use . . . in rendering an advertising service.” WAC 458-20-218; *see also* Respondent’s Brief at 22-23 (discussing North American Industrial Classification System descriptions of “advertising agencies” and “direct mail advertising”).⁴

Courts in other states have reached the same conclusion about Valpak franchisees in their states. *See Val-Pak of Omaha v. Dep’t of Revenue*, 545 N.W.2d 447, 448-50 (Neb. 1996) (Valpak licensee provided “advertising services” and VPDMS “published” the advertisements); *Val-Pak of Central Connecticut North, Inc. v. Comm’r of Revenue Services*, 670 A.2d 343, 343 (Conn. Super. 1994) (Valpak licensee engaged in the business of selling cooperative direct mailing services), *aff’d*, 669 A.2d

⁴ Outside this litigation, the franchisees identify themselves as being in the business of direct mail advertising. CP 643-54.

1211 (Conn. 1996). The court in the Connecticut case explained: “The ‘advertising service’ is the bundle of services that [the licensee] provides to its subscribing businesses, including advice on the content of the coupons and arranging with [VPDMS] to have the coupons printed, sorted and mailed.” 670 A.2d at 346.

Businesses engaged in providing advertising services are taxed under the “service & other” B&O tax rate in RCW 82.04.290(2). The franchisees properly reported their taxes under this classification for many years. CP 277. This Court should affirm their historical reporting practice and deny the franchisees’ refund claim.

3. Engaging in the business of publishing requires more than providing services “related to” publishing.

The franchisees have argued that to engage in the business of publishing means engaging in any business activity that is “part of” or “related to” the business of publishing, citing *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 156 P.3d 185 (2007), *cert. denied*, 128 S. Ct. 1224 (2008). *See* Appellants’ Brief at 13-14. They are incorrect.

Ford concerned the applicability of Seattle and Tacoma B&O taxes to Ford’s automobile wholesaling activities. One issue was whether the cities could impose their wholesaling B&O taxes on Ford’s income from selling automobiles to car dealers in the cities, when those dealers took title to the vehicles upon delivery to a carrier at Ford’s vehicle assembly plants outside Washington. Ford engaged in other activities in

the cities, including advertising, sending representatives to meet with dealers, and marketing and selling warranties. 160 Wn.2d at 38.

The Court in *Ford* did not decide whether Ford was engaged in the business of making sales at wholesale, because that point was undisputed. *Id.* at 38, 42. Although the Court did state that under the city ordinances, “[e]ngaging in the business of wholesaling encompasses more business activities than merely making sales,” *id.* at 42, it did *not* hold that businesses other than those actually making the wholesale sales should pay city wholesaling B&O taxes.

The franchisees imply that if a person other than Ford had been performing the marketing activities (e.g., meeting with dealers) as an agent or independent contractor for Ford, that person also would have been taxable as a wholesaler of Ford vehicles because its activities were “related to” the wholesale sales. But under *state* statutes, to be taxable for engaging in the business of wholesaling, a person must actually make sales at wholesale. RCW 82.04.060 (defining “sale at wholesale”); RCW 82.04.270 (tax on wholesalers based on “gross proceeds of sales”).

If an independent contractor came to Seattle and solicited sales of Ford vehicles for Ford, it would be subject to the state “service & other” B&O tax on its gross income from its services to Ford. Only Ford, which actually makes the sales, would be taxed as a wholesaler. See *Armstrong v. State of Washington*, 61 Wn.2d 116, 377 P.2d 409 (1962) (independent insurance agent properly taxable under “service & other” B&O tax rate on commissions where insurance company offices performing same functions

were exempt from B&O tax, but paid tax on gross premiums);

Fishermen's Coop. Ass'n v. State of Washington, 198 Wash. 413, 425, 92 P.2d 202 (1939) (power to sell distinguished fish wholesaler from mere broker or agent for tax purposes).

Likewise, the printing and publishing classification does not extend to virtually any business activity “related to” the printing and publishing industries. To qualify as a “person engaging . . . in the business of . . . publishing . . . periodicals, or magazines” under RCW 82.04.280, a person must actually be the publisher of the periodical or magazine. An independent contractor delivering newspapers every morning is not engaged in the business of publishing that newspaper, and neither is a contractor that solicits and helps prepare advertising for the newspaper.

This Court has recognized that the target of the B&O tax is the specified business activity. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 398-99, 103 P.3d 1226 (2005); *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 363-64, 841 P.2d 752 (1992); see RCW 82.04.220. When the Legislature made a policy decision to grant a preferential B&O tax rate to businesses engaged in printing or publishing periodicals, it did not also include within that rate other businesses “related to” publishing or a “part of” the broader publishing industry. The Court should reject the franchisees’ request to expand the preferential tax rate for printers and publishers of periodicals to taxpayers that do neither.

B. An Envelope Containing Loose Advertising Materials Is Not A “Periodical Or Magazine” Under RCW 82.04.280.

A “periodical or magazine” under RCW 82.04.280 is defined as “a printed publication, other than a newspaper, issued regularly at stated intervals at least once every three months, including any supplement or special edition of the publication.” As a matter of law, Valpak envelopes do not qualify. They are neither “printed publications” nor issued regularly “at *stated* intervals.”

1. Valpak envelopes are not “printed publications.”

The Court of Appeals concluded that Valpak envelopes “are printed pieces of paper comprising a ‘printed publication.’” *Bowie*, 150 Wn. App. at 23. This Court has instructed that courts should consider the ordinary meaning of words, “taking into account the statutory context, basic rules of grammar, and any special usages by the legislature on the face of the statute.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (quoting treatise); *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995) (look to whole statute). Notably, the statute uses the words “printed *publication*,” not “printed material.” Use of the more specific word “publication” instead of a generic term shows the Legislature did not intend to extend the definition of “periodical or magazine” to any printed materials distributed to the public (*e.g.*, direct mail advertising, political flyers, handbills, etc.).

The Court of Appeals erred by concluding that the definition did not contain any “format or content requirements.” *Bowie*, 150 Wn. App. at 22. The term “printed publication” in the context of the “periodical or

magazine” definition refers to a format, not any printed material.

Moreover, the requirement of a “stated interval” certainly qualifies as a format requirement.

The Florida courts have reached a better conclusion regarding Valpak envelopes, recognizing that “[a] publication may consist of printed material, but not all printed material constitutes a publication.” *Dep’t of Revenue v. Val-Pak Direct Marketing Systems, Inc.*, 862 So.2d 1, 4 (Fla. Ct. App. 2003). In that case, the court held that Valpak envelopes are not “circulated publications” under a sales tax exemption for advertising publications. *Id.* Thus, the Florida court determined Valpak envelopes failed to qualify as “publications” even for purposes of a tax exemption directed specifically to advertising publications.

The franchisees do not dispute that Valpak envelopes contain *none* of the characteristics periodicals or magazines typically exhibit: volume numbers, issue numbers, issue dates, mastheads, covers, bindings, tables of contents, numbered pages in sequence, information about the editorial staff, change-of-address instructions, subscription rates (if not free of charge), or a “stated interval” (e.g., “published monthly”). *See* CP 213-15 (RFA Nos. 1, 3, 6-10). In short, nothing about the blue envelopes or the loose advertisements inside suggest that a Valpak envelope is the type of printed material ordinary people (or the Legislature) would consider a periodical or magazine.

When construing a statute, a court’s goal is to give effect to legislative intent. *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d

546, 552, 988 P.2d 961 (1999). The court looks first to the plain language of the statute to determine its meaning. *Id.* Courts may refer to a dictionary to find the ordinary meanings of words, but they should avoid a literal reading of a statute that produces unlikely or strained consequences. *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992).

The Court of Appeals erred because the phrase “printed publication” is contained in a definition of “periodical or magazine,” in a statute providing a preferential tax rate to printers and publishers of newspapers, periodicals, and magazines. Considering the context, the Legislature’s choice of “printed publication” is significant and does not encompass any printed material. The Court should conclude that Valpak envelopes are not “printed publications” and, accordingly, do not qualify as “periodicals or magazines” under RCW 82.04.280.

2. Valpak envelopes are not issued at “stated intervals.”

Another basis for holding Valpak envelopes are not “periodicals or magazines” is that they do not contain a “stated interval” describing how frequently they are issued. The parties agree that Valpak envelopes are mailed “regularly” to Washington households on a monthly basis according to schedules the Franchisees provide *to advertisers* in flyers and on VPDMS’s website, Valpak.com. CP 151, ¶ 4; 163-65; 419-30; 432-36. Here, the Court of Appeals correctly recognized that a “periodical or magazine” “must provide the intended audience with its anticipated mailing or publication interval,” but erroneously applied its conclusion by remanding with the comment that the record was “unclear whether [the

mailing schedules] are readily available to recipients of the mailings.”

Bowie, 150 Wn. App. at 23-24.

The Court of Appeals should have concluded simply that the “periodicals or magazines” definition requires the “stated interval” to be stated on the printed publication. The phrase “stated intervals” has a long history and well-established meaning in connection with periodical publications in both federal and state law. The phrase first appeared in the Post Office Appropriation Act of 1879 as a requirement for admitting a publication to a second-class postal rate. 20 Stat. 355, 358-59, ch. 180 (1879). In 1904, the United States Supreme Court recognized that a publication with the words “Issued Monthly” printed on the front page met the requirement of being regularly issued at “stated intervals.” *Houghton v. Payne*, 194 U.S. 88, 95, 24 S. Ct. 590, 48 L. Ed. 888 (1904). The “stated interval” requirement appeared in Postal Service regulations from 1932 through 2006, which required that the “interval” or “frequency” of publication be “stated” on each copy of the publication. *See* Brief of Respondent at 33-34; Dep’t of Revenue’s Answer to App. Mot. for Recon. at 7-12.

Soon after the Postmaster General issued regulations in 1932, the Washington Legislature enacted the Revenue Act of 1935, which contained a retail sales tax exemption for newspapers. In a rule defining “newspaper” for purposes of the exemption, the State Tax Commission included the requirement that an exempt newspaper be “issued regularly at stated intervals” of at least once a week. Wash. State Tax Comm’n Rule

143 (1935). The Legislature amended the Revenue Act in 1937 to add a new preferential B&O tax rate, now codified in RCW 82.04.280, for persons “in the business of printing and of publishing newspapers, periodicals or magazines.” Laws of 1937, ch. 227, § 1. The Legislature left intact the Tax Commission’s definition of “newspaper” in Rule 143.

When the Legislature enacted a statutory definition of “newspaper” in 1993 and the statutory definition of “periodical or magazine” in 1994, the definition of “newspaper” in the Department’s rule had not changed substantially from the version adopted by the State Tax Commission in 1936. *See* WAC 458-20-143 (last amended in 1983). The 1993 statutory definition of “newspaper” retained the rule’s requirement that the publication be “issued regularly at stated intervals[.]” Laws of 1993, Sp. Sess., ch. 25, § 304 (codified at RCW 82.04.214). Similarly, the 1994 amendment to RCW 82.04.280 required that a “periodical or magazine” be “a printed publication, *other than a newspaper, issued regularly at stated intervals* at least once every three months[.]” Laws of 1994, ch. 112, § 1 (emphasis added).

This Court should take into account the meaning of the phrase “stated interval” in the context of periodicals and reject a “mechanical definition” based solely on a dictionary definition of the isolated word “state.” *See One Pacific Towers Homeowners’ Ass’n v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094 (2002) (meaning of words in context takes precedence over mechanical definition); *Campbell & Gwinn*, 146 Wn.2d at 11 (the plain meaning rule takes into account

“special usages”); *City of Spokane ex rel. Wastewater Mgt. Dep’t v. Dep’t of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002) (technical language in a tax statute should be given its technical meaning when used in its technical field or as a term of art). The franchisees’ interpretation of the word “stated” contains no requirements on where, how, or to whom the information is provided. They argue they only need to have a “set” or “fixed” publication interval that is “declared” to someone in some fashion. Petition for Review at 7-8. That interpretation renders the requirement of a “stated interval” meaningless, contrary to statutory interpretation principles. *See Simpson Investment Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 159, 3 P.3d 741 (2000).

The Legislature did not say “issued at regular intervals” – it said “issued regularly at *stated* intervals.” To give effect to the Legislature’s intent, this Court should apply the same meaning to “stated interval” in RCW 82.04.280 that Congress, the United States Postal Service, the United States Supreme Court, the State Tax Commission, and the Department have given the term since at least the beginning of the last century: the interval or frequency of publication must be stated on the publication.⁵

With this standard in mind, there is no reason for a remand because there are no material facts in dispute. The following facts are undisputed:

⁵ For examples in which other states have interpreted “stated interval” in their tax codes to require that the publication interval be stated on the publication, *see* Department’s Motion for Reconsideration at 6 n.2 and Appendices A-D thereto.

- The blue envelopes did not exhibit a publication volume, issue number, or issue date. CP 213.
- Nothing on the face of the blue envelopes indicated the frequency with which Valpak envelopes were published or distributed. CP at 213.
- Most of the advertising inserts in a Valpak envelope contained a copyright date, such as ©Val-Pak®, 3/1993, but not all coupons in an envelope contained the same copyright date, and some had no date at all. CP 210-11, 287, 299, 309, 345.
- Valpak envelopes and their contents did not contain any statement that they were “issued monthly” or “published monthly,” such as is contained in periodicals and magazines. *Compare* CP 285-372 (sample Valpak envelope), *with* 413-17 (examples from *State Tax Notes*, *Washington State Bar News*, and *Sunset* magazine).

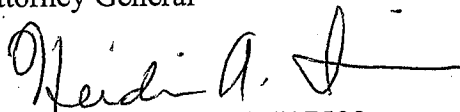
The Valpak envelopes in the record are not “periodicals or magazines” RCW 82.04.280 because they lack a “stated interval.”

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s summary judgment for the Department.

RESPECTFULLY SUBMITTED this 27th day of January, 2010.

ROBERT M. MCKENNA
Attorney General



Heidi A. Irvin, WSBA #17500
Donald F. Cofer, WSBA #10896
Attorneys for Respondent
Washington State Department of Revenue

part; 1941 c 178 § 1, part; 1939 c 225 § 1, part; 1937 c 227 § 1, part; 1935 c 180 § 4, part; Rem. Supp. 1949 § 8370-4, part.]

Intent—Effective date—2004 c 24: See notes following RCW 82.04.2909.

Contingent effective date—2003 2nd sp.s. c 1: See RCW 82.32.550.

Finding—2003 2nd sp.s. c 1: See note following RCW 82.04.4461.

Effective dates—2001 1st sp.s. c 9: See note following RCW 82.04.298.

Expiration dates—2001 1st sp.s. c 9: See note following RCW 82.04.290.

Effective date—1999 c 358 § 2: "Section 2 of this act takes effect July 1, 2001." [1999 c 358 § 23.]

Effective date—1999 c 358 §§ 1 and 3-21: See note following RCW 82.04.3651.

Effective date—1998 c 343: See note following RCW 82.04.272.

Effective date—1998 c 329: "This act takes effect July 1, 1998." [1998 c 329 § 2.]

Effective date—Savings—1998 c 312: See notes following RCW 82.04.332.

Severability—Effective dates—Part headings, captions not law—1993 sp.s. c 25: See notes following RCW 82.04.230.

Effective dates—1981 c 172: See note following RCW 82.04.240.

Effective date—1971 ex.s. c 186: See note following RCW 82.04.110.

82.04.272 Tax on warehousing and reselling prescription drugs. (1) Upon every person engaging within this state in the business of warehousing and reselling drugs for human use pursuant to a prescription; as to such persons, the amount of the tax shall be equal to the gross income of the business multiplied by the rate of 0.138 percent.

(2) For the purposes of this section:

(a) "Prescription" and "drug" have the same meaning as in RCW 82.08.0281; and

(b) "Warehousing and reselling drugs for human use pursuant to a prescription" means the buying of drugs for human use pursuant to a prescription from a manufacturer or another wholesaler, and reselling of the drugs to persons selling at retail or to hospitals, clinics, health care providers, or other providers of health care services, by a wholesaler or retailer who is registered with the federal drug enforcement administration and licensed by the state board of pharmacy. [2003 c 168 § 401; 1998 c 343 § 1.]

Effective dates—Part headings not law—2003 c 168: See notes following RCW 82.08.010.

Effective date—1998 c 343: "This act takes effect July 1, 2001." [1998 c 343 § 6.]

→ **82.04.280 Tax on printers, publishers, highway contractors, extracting or processing for hire, cold storage warehouse or storage warehouse operation, insurance general agents, radio and television broadcasting, government contractors—Cold storage warehouse defined—Storage warehouse defined—Periodical or magazine defined.** (*Contingent expiration date.*) Upon every person engaging within this state in the business of: (1) Printing and of publishing newspapers, periodicals, or magazines; (2) building, repairing or improving any street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of

the state or by the United States and which is used or to be used, primarily for foot or vehicular traffic including mass transportation vehicles of any kind and including any readjustment, reconstruction or relocation of the facilities of any public, private or cooperatively owned utility or railroad in the course of such building, repairing or improving, the cost of which readjustment, reconstruction, or relocation, is the responsibility of the public authority whose street, place, road, highway, easement, right-of-way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle is being built, repaired or improved; (3) extracting for hire or processing for hire, except persons taxable as extractors for hire or processors for hire under another section of this chapter; (4) operating a cold storage warehouse or storage warehouse, but not including the rental of cold storage lockers; (5) representing and performing services for fire or casualty insurance companies as an independent resident managing general agent licensed under the provisions of *RCW 48.05.310; (6) radio and television broadcasting, excluding network, national and regional advertising computed as a standard deduction based on the national average thereof as annually reported by the Federal Communications Commission, or in lieu thereof by itemization by the individual broadcasting station, and excluding that portion of revenue represented by the out-of-state audience computed as a ratio to the station's total audience as measured by the 100 micro-volt signal strength and delivery by wire, if any; (7) engaging in activities which bring a person within the definition of consumer contained in RCW 82.04.190(6); as to such persons, the amount of tax on such business shall be equal to the gross income of the business multiplied by the rate of 0.484 percent.

As used in this section, "cold storage warehouse" means a storage warehouse used to store fresh and/or frozen perishable fruits or vegetables, meat, seafood, dairy products, or fowl, or any combination thereof, at a desired temperature to maintain the quality of the product for orderly marketing.

As used in this section, "storage warehouse" means a building or structure, or any part thereof, in which goods, wares, or merchandise are received for storage for compensation, except field warehouses, fruit warehouses, fruit packing plants, warehouses licensed under chapter 22.09 RCW, public garages storing automobiles, railroad freight sheds, docks and wharves, and "self-storage" or "mini storage" facilities whereby customers have direct access to individual storage areas by separate entrance. "Storage warehouse" does not include a building or structure, or that part of such building or structure, in which an activity taxable under RCW 82.04.272 is conducted.

As used in this section, "periodical or magazine" means a printed publication, other than a newspaper, issued regularly at stated intervals at least once every three months, including any supplement or special edition of the publication. [2006 c 300 § 6; 2004 c 24 § 6; 1998 c 343 § 3; 1994 c 112 § 1; 1993 sp.s. c 25 § 303; 1993 sp.s. c 25 § 106; 1986 c 226 § 2; 1983 c 132 § 1; 1975 1st ex.s. c 90 § 3; 1971 ex.s. c 299 § 5; 1971 ex.s. c 281 § 7; 1970 ex.s. c 8 § 2. Prior: 1969 ex.s. c 262 § 38; 1969 ex.s. c 255 § 5; 1967 ex.s. c 149 § 13; 1963 c 168 § 1; 1961 c 15 § 82.04.280; prior: 1959 ex.s. c 5 § 4; 1959 ex.s. c 3 § 4; 1955 c 389 § 48; prior: 1950 ex.s. c 5 § 1, part; 1949 c 228 § 1, part; 1943 c 156 § 1, part; 1941 c

WAC 458-20-143Publishers of newspapers, magazines, periodicals.**Business and Occupation Tax**

Printing and publishing. Publishers of newspapers, magazines and periodicals are taxable under the printing and publishing classification upon the gross income derived from the publishing business.

Persons who both print and publish books, music, circulars, etc., or any other item, are likewise taxable under the printing and publishing classification. However, persons, other than publishers of newspapers, magazines or periodicals, who publish such things and do not print the same, are taxable under either the wholesaling or retailing classification, measured by gross sales, and taxable under the service classification, measured by the gross income received from advertising.

Retail Sales Tax

Sales of newspapers, whether by publishers or others, are specifically exempt from the retail sales tax.

However, sales of magazines, periodicals, and all publications other than newspapers are subject to the retail sales tax when made to consumers.

"Newspaper" defined. The word "newspaper" means a publication of general circulation bearing a title, issued regularly at stated intervals of at least once every two weeks, and formed of printed paper sheets without substantial binding. It must be of general interest, containing information of current events. The word does not include publications devoted solely to a specialized field. It shall include school newspapers, regardless of the frequency of publication, where such newspapers are distributed regularly to a paid subscription list.

Sales to newspapers, magazine and periodical publishers of paper and printers ink which become a part of the publications sold, and sales by printers of printed publications to publishers for sale, are sales for resale and are not subject to the retail sales tax.

With respect to community newspapers which are distributed free of charge, where the publisher has a contract with his advertisers to distribute the newspaper to the subscriber in consideration for the payments made by the advertisers, it will be construed that the publisher sells the newspaper to the advertiser, and, therefore, the retail sales tax will not apply with respect to the charge made by the printer to the publisher for printing the newspaper or with respect to the purchase of ink and paper when the publisher prints his own newspaper.

Sales to newspaper, magazine or periodical publishers of equipment and of supplies and materials which do not become a part of the finished publication which is sold are subject to the retail sales tax. This includes, among others, sales of engravings, fuel, furniture, lubricants, machinery, negatives and plates used in offset printing, photographs, stationery and writing ink. Sales of engravings to publishers are subject to the retail sales tax unless the publisher resells such engravings without intervening use.

Sales to newspaper, magazine or periodical publishers of baseball bats, bicycles, dolls and other articles of tangible personal property which are to be distributed by the publisher as gifts, premiums or prizes are sales for consumption and subject to the retail sales tax.

So-called "sales" by authors and artists to publishers of the right to publish scripts, paintings, illustrations and cartoons are mere licenses to use, not sales of tangible personal property and, therefore, are not subject to the retail sales tax.

Use Tax

Publishers of newspapers, magazines and periodicals are subject to tax upon the value of articles printed or produced for use in conducting such business.

[Statutory Authority: RCW 82.32.300, 83-16-053 (Order ET 83-5), § 458-20-143, filed 8/1/83; 83-07-034 (Order ET 83-17), § 458-20-143, filed 3/15/83; Order ET 70-4, § 458-20-143 (Rule 143), filed 6/12/70, effective 7/12/70.]

Chemicals, such as developing agents, fixing agents, etc., sold to a photo finisher, portrait or commercial photographer or photo engraver, which chemicals are used in producing pictures for sale.

The following activities, sometimes performed by a photographic supply house, are service activities, with respect to which the Retail Sales Tax does not apply. The supply house should pay the Retail Sales Tax when purchasing materials used or consumed in connection with the rendition of such services:

Camera repairs not involving the replacement of parts, and with respect to the charge for work done where parts are provided:
Retouching, splicing movie film, operating movie machines.
Effective May 1, 1935.

PUBLISHERS OF NEWSPAPERS, MAGAZINES, PERIODICALS **Rule 143.**

Retail Sales Tax (Title III)

Sales of newspapers, whether by publishers or others, are specifically exempt from the Retail Sales Tax.

However, sales of magazines, periodicals, racing forms and all publications other than newspapers are subject to the Retail Sales Tax when made to consumers.

"Newspaper" Defined.—The word "newspaper" means a publication of general circulation bearing a title, issued regularly at stated intervals of at least once a week, and formed of printed paper sheets without substantial binding. It must be of general interest, containing information of current events. It must in all editions contain at least 40% news in relation to not more than 60% of advertisements, whether the latter are paid for or not. The word does not include shopping guides and other publications devoted primarily to advertising, nor does it include racing forms or other similar publications devoted solely to a specialized field. It may include school newspapers where such newspapers are distributed regularly to a paid subscription list.

Sales to newspaper, magazine and periodical publishers of paper and ink which become a part of the publications sold, and sales by printers of printed publications to publishers for sale, are sales for resale and are not subject to the Retail Sales Tax. However, sales of printed publications, paper and ink to publishers are subject to the Retail Sales Tax when the publications are distributed free rather than sold.

Sales to newspaper, magazine or periodical publishers of equipment and of supplies and materials which do not become a part of the finished publication which is sold are subject to the Retail Sales Tax. This includes, among others, sales of engravings, fuel, furniture, lubricants, machinery, photographs, stationery and writing ink.

However, sales of engravings to publishers are sales for resale and are not subject to the Retail Sales Tax if the publisher resells such engravings to advertisers at a charge separate from any charges for advertising services, and where the title to such engravings passes to the advertiser. In such case the Retail Sales Tax must be collected by the publisher from the advertiser upon the sale of the engravings.

Sales to newspaper, magazine or periodical publishers of baseball bats,

bicycles, dolls and other articles of tangible personal property which are to be distributed by the publisher as gifts, premiums or prizes are sales for consumption and subject to the Retail Sales Tax.

So-called "sales" by authors and artists to publishers of the right to publish scripts, paintings, illustrations and cartoons are mere licenses to use, not sales of tangible personal property and, therefore, are not subject to the Retail Sales Tax.

Effective May 1, 1935.

Business and Occupation Tax (Title II)

Printing and Publishing.—Publishers of newspapers, magazines and periodicals are taxable under the "Printing and Publishing" classification upon the gross income derived from the publishing business.

Effective May 1, 1937. Prior to May 1, 1937, publishers were subject to the Business and Occupation Tax as follows:

"Manufacturing."—Taxable under the "Manufacturing" classification with respect to the printing and publishing of newspapers, magazines or periodicals upon the value of products manufactured, irrespective of where or to whom such publications are sold. This classification includes all publishers, irrespective of whether or not they print the publication sold. The value of the products manufactured includes the gross receipts derived from advertising, as well as the gross proceeds derived from the sale of the articles manufactured.

"Retailing."—Taxable under the "Retailing" classification upon the gross proceeds of sales with respect to the sale of newspapers, magazines or periodicals direct to consumers by subscription or otherwise.

PRINTING INDUSTRY

Rule 144.

Printing Industry Defined

The phrase "printing industry," which is covered in this ruling, includes all planeographic, relief and intaglio printing businesses except multigraphing, mimeographing and the like which are covered separately in Rule 145.

Retail Sales Tax (Title III)

(1) The printing or inprinting of advertising circulars, books, briefs, envelopes, folders, posters, racing forms, shopping guides, tickets, and other printed matter, whether upon special order or upon materials furnished either directly or indirectly by the customer is a retail sale and subject to the Retail Sales Tax, providing the customer either consumes, leases or distributes such articles free of charge and does not resell such articles in the regular course of business. The Retail Sales Tax is computed upon the total charge for printing, and the printer may not deduct the cost of labor, author's alterations, or other service charge in performing the printing, even though such charge is stated or shown separately on the evidence of sale.

Where stamped envelopes or government postals are purchased and printed for customers or where stamps are provided, the amount of the postage may be deducted from the total charge to the customer in determining the selling price.

Sales of printed matter to advertising agencies who purchase for their own use or for the use of their clients, and not for resale in the regular course of business, are deemed to be sales for consumption and subject to the Retail Sales Tax.

NO. 36977-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RICHARD AND ANNETTE
BOWIE, d/b/a VALPAK OF WESTERN
WASHINGTON – NORTH, et al.,

Appellants,

v.

WASHINGTON DEPARTMENT OF
REVENUE,

Respondent.

DECLARATION OF
MAILING

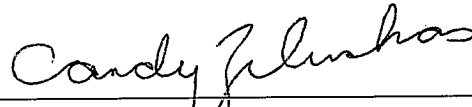
Candy Zilinskas, states and declares as follows:

I am a citizen of the United States of America and over 18 years of age and I am competent to testify to the matters set forth herein. On January 27, 2010, I provided a true and correct copy of Supplemental Brief of Respondent and this Declaration of Mailing electronically via email to: SEdwards@perkinscoie.com and by US Mail Postage Prepaid via Consolidated Mail Service to:

Scott M. Edwards
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 27th day of January, 2010, in Olympia, Washington.

A handwritten signature in cursive script, reading "Candy Zilinskas", positioned above a horizontal line.

CANDY ZILINSKAS
Legal Assistant